

FEB 8 1978

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. **77-1113**

CARLOS LOZADA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

**Petition for a Writ of Certiorari to the New York
Supreme Court, Appellate Division, Second Depart-
ment.**

IRVING ANOLIK

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In the
SUPREME COURT OF THE UNITED STATES
October Term 1977
No. _____

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CARLOS LOZADA,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

----- X

PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK SUPREME COURT APPELLATE DI-
VISION, SECOND DEPARTMENT.

STATEMENT.

Petitioner respectfully prays that
this Court issue a writ of certiorari to
review the order of the New York Supreme
Court, Appellate Division, Second Depart-
ment, rendered the 16th day of May, 1977,

affirming the conviction of the defendant-appellant Lozada, petitioner herein, which conviction had been rendered the 23rd day of June, 1976, convicting him of murder second degree, after trial in the Supreme Court, Queens County.

Petitioner was sentenced to a term of 25 years to life imprisonment and is presently incarcerated.

OPINION BELOW.

The Appellate Division, Second Department, affirmed the judgment for murder second degree, rendering an opinion which is reproduced in the appendix hereto.

On the 9th of September, 1977, Judge Sol Wachtler, Associate Judge of the New York Court of Appeals, denied leave to appeal. A copy of Judge Wachtler's order is annexed.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The Appellate Division, Second Department, affirmed the judgment of conviction on the 16th day of May, 1977, and Judge Sol Wachtler of the New York Court of Appeals denied leave to appeal on the 9th day of September, 1977. Associate Justice Thurgood Marshall of this Court extended petitioner's time to file for certiorari until February 6, 1978. A copy of that order is annexed, and it bears Supreme Court Number A-454.

QUESTIONS PRESENTED.

1. Whether petitioner was deprived of a fair trial under the Fourteenth Amendment of the United States Constitution, by virtue of the Trial Court's refusal to permit defendant's wife to testify concerning

his explanation of an alleged "flight" to Pennsylvania following the alleged homicide? (Sixth and Fourteenth Amendments.)

2. Whether petitioner was deprived of a fair trial by the conduct of the trial prosecutor, who injected his own credibility into the case, and the conduct of the trial judge, who badgered and argued with defense counsel in a prejudicial manner?

3.. Whether petitioner was deprived of the equal protection of the laws under the Fourteenth Amendment because of the fact that apparently no 18-year-old prospective jurors were summoned to the array or the poll?

4. Whether petitioner was deprived of due process of law when the Trial Court refused to permit Lozada to interpose a defense of extreme emotional disturbance?

5. Whether petitioner was properly identified by two youngsters who were the main witnesses for the prosecution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Sixth and Fourteenth Amendments of the United States Constitution are involved.

INDICTMENT IN COURT BELOW.

The Indictment number in the Court below was returned in the Supreme Court, Queens County, 1868/75.

The indictment charged the defendant with having murdered an individual in Queens County, as a result of an altercation concerning an automobile. Very dubious identification procedures were conducted during a lineup.

The very youthful witnesses were really unable to identify the defendant as the perpetrator, but after considerable equivocation, a very questionable identification emerged.

The petitioner herein has exhausted his funds and is unable to pursue this matter with the type of brief he would prefer. We therefore ask that this Court subpoena the briefs and files of the State Courts, under the aforesaid indictment number (1868/75), and the records of the Appellate Division, Second Department, under number 779-E, which is that Court's control number.

The petitioner incorporates by reference all of the briefs and arguments made and filed in the Court below.

REASONS FOR GRANTING CERTIORARI.

The questions presented, *supra*, set forth the issues upon which review is sought. The petitioner herein was prevented from utilizing the testimony of his wife on a very important matter, namely to explain the alleged reason for his flight. We maintain that this ruling violated petitioner's rights under the Sixth Amendment of the United States Constitution, which mandates that he be permitted to call witnesses in his behalf.

The petitioner was further prejudiced by virtue of the identification procedures utilized, which, in essence, were grossly insufficient to have warranted Lozada being charged with this crime. Extremely young children were primarily the witnesses relied upon and they were unable to identify the petitioner. The identifications

that ultimately emerged were very equivocal and totally unreliable.

Moreover, petitioner was obviously tried before a jury which numbered no 18-year-olds among them (*Taylor v. Louisiana*, 419 U. S. 522 [1975]).

The defense counsel was made to look foolish and was insulted by the Trial Judge, who harangued him throughout the trial. The prosecutor vouched for the credibility of certain witnesses, thereby depriving petitioner of a fair trial.

CONCLUSION.

The petition for certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK,
A Member of the Bar of
this Court,
Attorney for Petitioner.

APPENDIX.

ORDER OF AFFIRMANCE BY APPELLATE DIVISION.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 16, 1977.

HON. M. HENRY MARTUSCELLO,
Justice Presiding
HON. HENRY J. LATHAM,
HON. J. IRWIN SHAPIRO,
HON. FRANK D. O'CONNOR,
Associate Justices

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

CARLOS LOZADO,

Appellant.

----- X

In the above entitled action, the above named Carlos Lozado, defendant in this action, having appealed to this court from a judgment of the Supreme Court, Queens County, rendered June 23, 1976, convicting him of murder in the second degree, upon a jury verdict, and imposing sentence; and the said appeal having been argued by Irving Anolik, Esq., of counsel for the appellant, and argued by Barry A. Schwartz, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion & decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed.

ENTER:

IRVING N. SELKIN
Clerk of the Appellate
Division

OPINION OF APPELLATE DIVISION.

AD 2d

A - April 28, 1977

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THE PEOPLE, etc.,

Respondent,

v.

CARLOS LOZADA,

Appellant.

----- X

Irving Anolik, New York, N. Y., for
appellant.

John J. Santucci, District Attorney,
Kew Gardens, N. Y. (Barry A. Schwartz of
counsel), for respondent.

Appeal by defendant from a judgment
of the Supreme Court, Queens County, ren-
dered June 23, 1976, convicting him of

murder in the second degree, upon a jury verdict, and imposing sentence.

Judgment affirmed.

Defendant was indicted for murder in the second degree. An overwhelming amount of circumstantial and direct evidence was introduced at the trial to establish that the defendant had been embroiled in an altercation with the victim over a double-parked car which blocked the street and that, when the victim grabbed the defendant's shirt, the defendant retaliated by shooting the victim in the chest and head four times at very close range. A review of the trial transcript reveals that the relationship between opposing counsel during this lengthy trial deteriorated to a thoroughly unprofessional level of accusation, gesture and innuendo. Under these

difficult and trying circumstances, the trial court showed great restraint in dealing with both sides and, at times, justifiably resorted to "aggressive control of the proceedings to ensure a fair trial" (see *People v. Gonzalez*, 38 N. Y. 2d 208, 210).

We have considered the other contentions of the defendant and find them to be without merit.

MARTUSCELLO, J.P., LATHAM, SHAPIRO
and O'CONNOR, JJ., concur.

May 16, 1977

CERTIFICATE OF JUDGE SOL WACHTLER DENYING
LEAVE TO APPEAL TO COURT OF APPEALS.

STATE OF NEW YORK

COURT OF APPEALS.

BEFORE: HON. SOL WACHTLER, Associate Judge

- - - - - X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

CARLOS LOZADO

- - - - - X

I, SOL WACHTLER, Associate Judge of
the Court of Appeals of the State of New
York, do hereby certify that, upon appli-
cation timely made by the above-named
appellant for a certificate pursuant to

CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
September 9, 1977

SOL WACHTLER
Associate Judge

* Description of Order: Judgment of Supreme Court, Queens, June 23, 1976; affirmed by Appellate Division, Second Department, May 16, 1977.

ORDER OF SUPREME COURT EXTENDING TIME TO
FILE PETITION FOR WRIT OF CERTIORARI.

SUPREME COURT OF THE UNITED STATES

----- X

No. A-454

CARLOS LOZADO,

Petitioner,

v.

NEW YORK

----- X

UPON CONSIDERATION of the application
of counsel for petitioner,

IT IS ORDERED that the time for fil-
ing a writ of certiorari in the above-

entitled cause be, and the same is hereby,
extended to and including February 6, 1978.

/s/THURGOOD MARSHALL
Associate Justice of
the Supreme Court of
the United States

Dated this 22nd day of
November, 1977.